(2)

Supreme Court, U.S.
FILED
MAR 5 2001
OFFICE OF THE CLERK

No. 00-1249

In the Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN A. WEISS
Counsel of Record
DANIEL J. POLATSEK
SCHOPF & WEISS
312 West Randolph Street
Suite 300
Chicago, Illinois 60606
(312) 701-9300

Attorneys for Respondent Chicago Park District

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

21pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Respondent informs this Court that the Chicago Park District has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the Chicago Park District.

TABLE OF CONTENTS

PAGE

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 6

I. THE COURT SHOULD NOT INTERFERE WITH THE LOWER COURTS' FINDINGS THAT THE PARK DISTRICT CODE DOES NOT CONTAIN UNBRIDLED DISCRETION 6

II. THE SEVENTH CIRCUIT DID NOT HOLD THAT A FACIAL CHALLENGE IS INAPPROPRIATE 7

III. THE COURT NEED NOT ADDRESS WHETHER THE CODE SHOULD BE ANALYZED AS A PRIOR RESTRAINT OR A TIME, PLACE AND MANNER RESTRICTION 8

IV. THIS CASE DOES NOT IMPLICATE THE SPLIT BETWEEN CIRCUITS ON *FREEDMAN* REQUIREMENTS BECAUSE IT IS NOT A "CENSORSHIP" OR ADULT LICENSING CASE 10

CONCLUSION 15

TABLE OF AUTHORITIES

PAGE(S)

11126 Baltimore Blvd., Inc. v. Prince Goerge's County Md., 58 F.3d 988 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1010 (1995) 11

Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) 11

Beal v. Stern, 184 F.3d 117 (2d Cir. 1999) 12

Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761 (11th Cir. 2000) ... 12, 13

City News & Novelty, Inc. v. City of Waukesha, No. 99-1680, slip op. at 1-2 (U.S. Jan. 17, 2001) 11

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 8

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 14

East Brooks, Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 277 (1995) 11

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 7, 9, 10

Freedman v. Maryland, 380 U.S. 51 (1965) .... *passim*

FW/PBS, Inc. v. City of Dallas,
439 U.S. 215 (1990) 9, 10, 11

Hill v. Colorado, 530 U.S. 703 (2000) 8

Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988) 7

MacDonald v. Chicago Park District,
132 F.3d 355 (7th Cir. 1997) 4, 5, 6, 7

MacDonald v. Chicago Park District,
No. 97 C 2963, 1999 WL 203288
(N.D. Ill. Mar. 30, 1999) 6

MacDonald v. Safir, 206 F.3d 183
(2d Cir. 2000) 12, 13

Thomas v. Chicago Park District,
227 F.3d 921 (7th Cir. 2000) ..... *passim*

Ty, Inc. v. Jones Group, Inc.,
237 F.3d 891 (7th Cir. 2001) 14

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 8, 10

STATEMENT OF THE CASE

In accordance with Rule 24(g), the Chicago Park District (the "Park District") submits this statement to correct some of the factual inaccuracies in Petitioners' statement of the case and to add facts of relevance to this petition.

This case involves a facial challenge to the Code of the Chicago Park District governing permits for use of the Chicago parks.[1] The permit sections of the Park District Code apply equally to permits for picnics, corporate events, athletic events and "rallies." (§C.3.a - App. 91a-92a.[2]) Anyone who wants to secure exclusive use of a Park District property must apply for a permit. Anyone who seeks to conduct certain types of events, such as a sporting event, erecting a structure, or selling goods, must apply for a permit whether or not they seek exclusive use of the property. (*Id.*) And, anyone seeking to hold an event of more than fifty people must apply for a permit. (*Id.*) The requirement of a permit is necessary to allow the public at large free access to the parks which are held in stewardship for everyone, and to prevent multiple events from being scheduled on the same property at the same time.

---

[1] Summary judgment was granted against Petitioners' "as applied" challenge on July 1, 1998 and was never appealed by Petitioners. In addition, the substituted plaintiffs were not denied a permit and cannot make an as applied challenge.

[2] Selected portions of the Park District Code are included in Petitioners' Appendix as 91a-101a and where appropriate will be cited as "App. ___."

The Code provides specific procedures and timelines for acting upon a permit application. The Park District must provide a written response within fourteen days of an application's filing, but if necessary, this time can be extended an additional fourteen days.[3] The Code sets forth specific grounds for denial of a permit, such as failing to submit a complete application or the required licenses and fees, or that the proposed event is illegal, dangerous, or in violation of Park District regulations. (§C.5.e - App. 96a-98a.) If a permit is denied, the denial must be in writing and must set forth the grounds for denial. (§C.5.e - App. 96a.) The denial must contain a proposal by which the applicant can cure any defects, and if a denial is based on a scheduling conflict, the denial must provide alternative locations or times. (*Id.*) An applicant may file an appeal with the Superintendent of the Park District within seven days of a permit denial, and that appeal must be decided, in writing, within seven days. (§6.a - App. 99a-100a.) The applicant may submit whatever information it deems appropriate with the appeal. (*Id.*) If the initial application is not denied or the appeal not ruled on within the proscribed times, the permit must be granted.[4]

---

[3] Petitioners did not include the portion of the Code providing timelines for acting on an application, section C.5.c. However, the Magistrate reviewed the Code and found that it contained the fourteen day requirement. (App. 16a, n.2.)

[4] The Petition contains several inaccuracies regarding the permit process. Footnotes 3 and 4 are incorrect because the Code requires the Park District to "clearly set forth [in writing] the grounds upon which the permit was denied." (§C.5.e - (continued...)

MacDonald's initial application for a permit was denied in writing on March 12, 1999, eight days after it was submitted. (App. 18a.[5]) He filed an appeal with the Superintendent which was denied on March 24, 1997. (App. 19a.) On April 25, 1997, MacDonald filed suit and sought an emergency preliminary injunction. (App. 19a.) That initial request was denied on May 9, 1997 because of MacDonald's month long delay in seeking emergency relief. (App. 20a.)

Despite the fact that MacDonald was denied a permit, he held his rally in the Chicago parks on May 10 and 11, 1997. (App. 17a.) Approximately 5,000 people attended the rally. MacDonald did not file an application for a rally in August 1997, but sought an injunction allowing such a rally. The District Court issued a preliminary injunction on August 15, 1997, allowing MacDonald's rally to go forward. Although the Seventh Circuit Court of Appeals stayed that Order on August 26, 1997 (and eventually reversed the preliminary injunction), MacDonald was allowed to conduct his rally as scheduled.

(...continued)
App. 96a.) Contrary to Petitioners' statement in footnotes 5 and 6, the Code holds a permittee responsible only for damages "proximately caused" by him or her. (§C.4.c and d - App. 93a-95a.) Footnote 11 of the Petition is also incorrect as MacDonald was granted a permit for an August 1998 rally. (App. 21a, n.8.) A permittee is entitled to a hearing by a non-employee hearing officer in certain circumstances. (§C.4.d(2) - App. 94a-95a.)

[5] The Magistrate's April 27, 1998 Report and Recommendation, including factual findings, is contained in Petitioners' Appendix as 14a-54a, and the Magistrate's March 8, 1999 Report and Recommendation is found at 55a-74a.

In 1998, MacDonald filed applications for rallies in May and August. His request for a May rally was denied, but with alternative locations and dates suggested. MacDonald's application for an August rally was granted (although MacDonald decided not to hold that rally). (App. 21a, n.8.) MacDonald died on June 6, 1999. The Seventh Circuit allowed Petitioners to substitute as plaintiffs.

There were two evidentiary hearings on preliminary injunction motions at which evidence was introduced regarding the Park District's practices and procedures. The testimony established that the Park District had never sought to prevent a "spontaneous" rally from taking place and in fact allowed such rallies, even without a permit, on a regular basis. *Thomas v. Chicago Park District*, 227 F.3d 921, 926 (7th Cir. 2000). (App. 7a.)[6] As noted by the Seventh Circuit in its initial opinion, "there is nothing in the record to indicate that the Park District has ever intervened to stop a First Amendment rally in one of its parks due to the absence of a permit." *MacDonald v. Chicago Park District*, 132 F.3d 355 (7th Cir. 1997).[7]

---

[6] The Seventh Circuit and District Court opinions are contained in Petitioners' Appendix and will be cited as "App. ___" in addition to the official reporter citation.

[7] The initial Seventh Circuit decision is under the caption of *MacDonald v. Chicago Park District*, whereas the subsequent Seventh Circuit decision and this Petition are under the caption of *Thomas v. Chicago Park District* because of MacDonald's death on July 6, 1999.

The Seventh Circuit Opinions

The Seventh Circuit's initial decision, reversing and vacating the issuance of a preliminary injunction, was based on the lack of irreparable harm to MacDonald because he was not denied the opportunity to speak (i.e. to hold his rally), and the lack of a probability of success on the merits. *MacDonald v. Chicago Park District*, 132 F.3d 355 (7th Cir. 1997). The case returned to the District Court and on March 29, 1999 the Park District was granted summary judgment. (App. 75a-90a.)

On the subsequent appeal, the Seventh Circuit addressed both the substantive merits and the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965). The Seventh Circuit upheld the District Court's determination that the Park District Code was content-neutral and did not contain "unbridled discretion." *Thomas v. Chicago Park District*, 227 F.3d 921, 924-26 (7th Cir. 2000). (App. 5a-7a.) The Court also held that access to judicial review through the Illinois common law writ of certiorari or a suit in federal court satisfy the requirements of *Freedman* where the ordinance is content neutral, does not require the regulatory authority to evaluate the content of the activity regulated, and does not "censor" speech. *Thomas*, 227 F.3d at 926-927. (App. 8a-9a.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners set forth five questions upon which they seek review. None of these questions rise to the level of importance or present the type of judicial conflict requiring this Court to intervene.

I. THE COURT SHOULD NOT INTERFERE WITH THE LOWER COURTS' FINDINGS THAT THE PARK DISTRICT CODE DOES NOT CONTAIN UNBRIDLED DISCRETION.

Petitioners seek review on whether a permit ordinance can allow unfettered discretion to the decision maker. But, no one contends that it may. It is undisputed that an ordinance restricting speech cannot contain unfettered discretion that would allow the decision maker to discriminate against unpopular ideas. Both the District Court and the Seventh Circuit acknowledged this requirement. *MacDonald v. Chicago Park District*, No. 97 C 2963, 1999 WL 203288 at *4-5 (N.D. Ill. Mar. 30, 1999) (App. 83a.); *MacDonald*, 132 F.3d at 361; *Thomas*, 227 F.3d at 924-25 (App. 5a-6a).

Here, the District Court and Seventh Circuit examined the Code and held that it did not confer unfettered discretion to governmental officials. *Thomas*, 227 F.3d at 924-26 (App. 5a-7a); *MacDonald v. Chicago Park District*, No. 97 C 2963, 1999 WL 203288 at *4 (N.D. Ill. Mar. 30, 1999) (App. 84a-85a). Petitioners do not contend that either the Seventh Circuit or the District Court misinterpreted this legal maxim. Rather, Petitioners dispute how this maxim was applied to them. Thus, Petitioners now seek to have this Court review the propriety of the lower

courts' application of the general rule to the Code. This is not the function of a writ of certiorari and the Court should not grant certiorari on this issue. Supreme Court Rule 10.

II. THE SEVENTH CIRCUIT DID NOT HOLD THAT A FACIAL CHALLENGE IS INAPPROPRIATE.

Petitioners contend that the Seventh Circuit abridged the ability of a plaintiff to make a facial challenge to an unconstitutional statute or ordinance. This is simply a misreading of the opinion. The Seventh Circuit did not hold that a facial challenge to the Park District Code was improper. Rather, the Court specifically acknowledged that facial challenges are appropriate where a challenge is to a statute as written or where a statute is so broad as to risk improper application. *Thomas*, 227 F.3d at 923. (App. 2a.) (Relying on *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) and *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).) The Seventh Circuit also recognized the place of a facial challenge in its earlier opinion in this case. *MacDonald*, 132 F.3d at 361-362 (noting that a prior Seventh Circuit case "poses a substantial obstacle to MacDonald's ability to establish that section C(5)(e) is facially invalid").

The Seventh Circuit has not "abolished" facial challenges. It first addressed and rejected Petitioners' facial challenge, and only referred to an as applied remedy after it found that the Code is content neutral and does not allow unbridled discretion. *Thomas*, 227 F.3d at 926. (App. 7a.) The Seventh Circuit did not hold, and Respondent has never argued, that a facial challenge is unavailable or inappropriate to Petitioners here. The Seventh

Circuit simply found that any unconstitutional *application* of the Code could be remedied by an as applied challenge. Here, the Park District was granted summary judgment on Petitioners' as applied challenge.

III. THE COURT NEED NOT ADDRESS WHETHER THE CODE SHOULD BE ANALYZED AS A PRIOR RESTRAINT OR A TIME, PLACE AND MANNER RESTRICTION.

Contrary to Petitioners' argument, the Seventh Circuit did not ignore a prior restraint analysis. Rather, it held that whether the Code is analyzed as a content-neutral prior restraint is not determinative of its constitutionality. *Thomas*, 227 F.3d at 923-924. (App. 3a.) ("The historical referent of 'prior restraints' is censorship [citation omitted] which the administration of a park system does not much resemble.") Accordingly, the Seventh Circuit analyzed the Code in the same manner as did this Court in reviewing content neutral licensing regulations in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

In *Hill v. Colorado*, this Court recently applied such an analysis in addressing a statute that prohibited knowingly approaching an individual within 100 feet of a health care facility entrance for purposes of counseling or educating, without that person's consent. *Hill v. Colorado*, 530 U.S. 703 (2000). Although the Court found that the statute limited speech, it also found that the statute was content neutral. 530 U.S. at ___, 120 S. Ct. at 2494. The Court then analyzed the statute as a time, place and manner regulation. *Id.* The Court rejected plaintiffs'

argument that the ordinance should be analyzed as a prior restraint because the Colorado ordinance, like the Park District Code, does not prohibit any message and does not silence any speaker. *Id.* at 2499.

As the Seventh Circuit observed below, this Court has treated licensing laws as prior restraints only when they permit licensing authorities to restrain speech on the basis of its content. *Thomas v. Chicago Park District*, 227 F.3d at 926. (App. 9a.) In *Freedman v. Maryland* itself, the motion picture censorship statute at issue allowed a licensing authority to prohibit the exhibition of films that it found to be "obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." 380 U.S. at 52, n.2. This Court also has applied prior restraint doctrine to licensing laws that are triggered by the sexually-oriented content of a licensee's speech. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Petitioners mischaracterize the holding of *FW/PBS* as requiring that a prior restraint analysis must be made *before* an ordinance can be analyzed as a time, place and manner restriction. (Petition at 18-20.) The Court did not reach a time, place and manner analysis in *FW/PBS* because it first determined that the regulation was otherwise deficient. 493 U.S. at 223. The two analyses go hand in hand, not necessarily seriatim. This Court has made clear that, "government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade or rally." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). If an ordinance is content neutral and limits the time for issuing a decision, it is properly

analyzed as a time, place and manner restriction. *Ward v. Rock Against Racism*, 491 U.S. at 791. ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech [and are narrowly tailored]'.") *See also*, *Forsyth County*, 505 U.S. at 130. *FW/PBS* and the Court's other decisions require that prior restraints contain procedural safeguards and reasonable time, place and manner restrictions, but they do not hold that a content neutral ordinance cannot be analyzed as a time, place and manner restriction.

IV. THIS CASE DOES NOT IMPLICATE THE SPLIT BETWEEN CIRCUITS ON *FREEDMAN* REQUIREMENTS BECAUSE IT IS NOT A "CENSORSHIP" OR ADULT LICENSING CASE.

The Seventh Circuit held that for a non-censorship, content neutral licensing ordinance, the Illinois common law writ of certiorari and access to prompt review in the federal courts are sufficient procedural safeguards under *Freedman v. Maryland* and *FW/PBS*. The Seventh Circuit limited its holding to "a regulation of expressive activity when the regulation is not a form of censorship, that is, does not require or permit the regulatory authority to evaluate the content or message of the activity regulated." *Thomas v. Chicago Park District*, 227 F.3d at 926. (App. 8a.) This holding is not inconsistent with the decisions of this Court, or of the other Circuits.

Petitioners argue that the Code is invalid because it fails to provide procedural protections that must accompany prior restraints as identified by this Court in

Freedman and *FW/PBS*. As this Court has recently observed, there is a split in the circuits on whether the doctrine articulated in these cases requires a law licensing sexually-oriented businesses to assure a prompt decision on the merits by a judicial officer or "an avenue for prompt judicial review." *See City News & Novelty, Inc. v. City of Waukesha*, No. 99-1680, slip op. at 1-2 (U.S. Jan. 17, 2001). (*See also* Petition at 10-16.) But this case does not present the question on which the circuits have split, because the regulation at issue here is not triggered by the content of speech, as the Seventh Circuit correctly concluded. *Thomas*, 227 F.3d at 927-928. (App. 11a-12a.)

Nearly all of the decisions in other circuits on which Petitioners rely in positing a conflict on the meaning of "prompt judicial review" present a different issue under First Amendment prior restraint analysis, for precisely the reason identified by the Seventh Circuit. Those cases involved regulation of businesses disseminating sexually-oriented materials, and thus, as the court of appeals observed, "[t]he government's evident concern with the content of the 'speech' disseminated by such businesses argues for greater judicial vigilance . . . ." *Thomas*, 227 F.3d at 927. (App. at 11a.).[8] While there may be a split between the circuits on what procedural safeguards are necessary in the context of an adult business licensing scheme, this is not that case.

---

[8] *See 11126 Baltimore Blvd., Inc. v. Prince George's County Md.*, 58 F.3d 988 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1010 (1995) (adult bookstore); *East Brooks, Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 277 (1995) (adult business); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) (adult bookstore).

Petitioners rely on only two decisions not involving the regulation of sexually-oriented speech, and those cases do not establish a conflict in the circuits on the question presented here. In *MacDonald v. Safir*, 206 F.3d 183 (2d Cir. 2000), the plaintiff challenged the constitutionality of New York City's parade permit ordinance. The Second Circuit did no more than observe that questions of fact existed about whether the state-court remedy available to those whose permit applications had been denied was sufficient to provide the requisite opportunity for prompt judicial review. *Id.* at 194-95. The court also observed that permitting officials might be obligated under *Freedman* to bear the burden of initiating judicial proceedings to enforce the denial of an application, but only if in future proceedings the plaintiff was able to establish that under the ordinance at issue the discretion granted to officials was sufficiently broad to allow them to act on the basis of the content of speech. *Id.* at 195. These highly provisional holdings establish nothing with sufficient clarity to amount to a conflict with the Seventh Circuit's decision in this case.[9]

In *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), the court considered the validity of several ordinances governing event permits, street closing permits, and sound amplification permits. The Eleventh Circuit held that under *Freedman*, the municipality was required to bear the burden of initiating judicial proceedings to enforce the denial of a street closing permit application. *Id.* at 774-76. However, the street closing ordinance applied to virtually any demonstration—it required a permit whenever persons "assemble or congregate in crowds in such numbers as to block the use of any sidewalk or street of the City. . . ." *Id.* at 773, n.17 (quoting Gainesville Code § 23-42). The ordinance at issue in *Safir* was even broader, applying to any parade or procession in a street or other public place. *MacDonald v. Safir*, 206 F.3d at 186. And permits under each of those two ordinances affected the availability of speech, not just the time and place.

[9] In *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999), involving a park permit regulation, the Second Circuit's decision was in accord with the Seventh Circuit here, and does not present any conflict.

The Park District Code, in contrast, applies to a wide variety of events and activities, only some of which are protected, and requires a permit only for the use of public parks for events involving more than fifty persons, and only if exclusive use of the park is required. (App. 91a.) The Seventh Circuit noted that, "[i]t is not even clear that the regulation reduces the amount of speech." *Thomas*, 227 F.3d at 924. (App. 3a.) As the Seventh Circuit correctly observed,

> [A] permit requirement is a sine qua non of managing a park system in a way that will preserve the value of parks for the general public. Parks are primarily for recreation rather than for political and ideological agitation. They cannot be preserved in the primary use for which they are intended if any group can hold a rally of any size and length at any time with amplified sound of any volume.

Thomas, 227 F.3d at 924. (App. 4a.) This Court has taken a similar view of the propriety of regulations that pre-

serve public parks for their primary purpose. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-99 (1984).

Under the facts of this case, the Seventh Circuit held that an aggrieved applicant has two sources of judicial review. In Illinois, administrative actions are reviewable by means of a proceeding for common law certiorari, containing the same review process as the state's administrative review act. *Thomas v. Chicago Park District*, 227 F.3d at 926. (App. 8a-9a.) However, if an applicant requires a more expeditious ruling, or is dissatisfied with the state review process, the applicant can do what MacDonald did here and the plaintiffs in many of the other cited cases have done: bring suit in federal court and seek emergency relief. *Thomas*, 227 F.3d at 927. (App. 10a.)

MacDonald's motion for temporary restraining order was heard and ruled on within fifteen days of filing. Petitioners, and other applicants, are assured of at least a preliminary judicial review by the protections offered by the Federal Rules of Civil Procedure, and similar state rules. Although a ruling on a motion for preliminary injunction is not a final adjudication, the standard is lower than would be required for an applicant to ultimately prevail. *See Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001) (preliminary injunction requires only a likelihood of success on the merits). And, at least in the context of the Park District Code, once an applicant obtains a preliminary injunction, his or her event can take place. Here, Petitioners held their rally even though the preliminary injunction was ultimately reversed. If anything, judicial review through state and

federal injunction remedies provides a lower standard and more protection to a potentially aggrieved applicant.

The Park District Code applies only to a limited and special category of public property and lacks the much broader inhibitory effects that led the Eleventh Circuit to characterize the permit ordinance at issue in *Cannabis Action Network* as a prior restraint subject to the *Freedman* safeguards. The Eleventh Circuit held in *Cannabis Action Network* that the *Freedman* requirement that the licensing authority bear the burden of initiating judicial proceedings applied to the municipal ordinance at issue in that case. However, it is far from clear that the Eleventh Circuit would reach the same result in a case like this one, involving an ordinance that endeavors to preserve the public parks for their primary intended uses, but leaves applicants free to demonstrate elsewhere. There is no square conflict between the decision below and the decisions in *Cannabis Action Network* or *Safir*, and for that reason this case does not warrant this Court's plenary review.

CONCLUSION

This Court should not grant certiorari here because the Seventh Circuit ruling is consistent with the prior decisions of this Court and is not inconsistent with decisions of the other Circuits. There is no reason why this Court should act as an additional appellate level in reviewing whether the Code contains "unbridled discretion." The Seventh Circuit's application of facial challenges and the prior restraint/time, place and manner analyses is completely in keeping with this Court's de-

cisions. And, to the extent that the Court seeks to resolve the conflict between the circuits on application of the *Freedman* safeguards, it should do so in the area where the conflict exists, licensing of adult oriented businesses.

The Petition should be denied.

Respectfully submitted,

STEVEN A. WEISS
Counsel of Record
DANIEL J. POLATSEK
SCHOPF & WEISS
312 West Randolph Street
Suite 300
Chicago, Illinois 60606
(312) 701-9300

Attorneys for Respondent
Chicago Park District